

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE
SIXTH JUDICIAL DISTRICT AT KNOXVILLE

STATE OF TENNESSEE, *ex rel.*,
ROBERT E. COOPER, JR.,
Attorney General & Reporter,

Plaintiff,

v.

No. 169384-3

PAYTON ABERNATHY, individually and
d/b/a PEYTON ENTERPRISES, d/b/a
www. MAKE MONEY STUFFING.COM,
d/b/a/ GLOBAL MAIL MARKETING,
d/b/a AMERICAN MAIL MARKETING,
d/b/a PC ENTERPRISES, d/b/a FREEDOM
MARKETING, and d/b/a www.mailing
program.com and KEVIN SPARKS, individually
and in a representative capacity
of all other Defendants,

Defendants.

**BRIEF IN SUPPORT OF STATE'S MOTION FOR A TEMPORARY INJUNCTION,
APPOINTMENT OF A RECEIVER, ASSET FREEZE
AND REVOCATION OF BUSINESS LICENSE**

PRELIMINARY STATEMENT

Payton Abernathy, his officers, agents and employees, doing business as Peyton Enterprises, Make Money Stuffing, Global Mail Marketing, PC Enterprises, American Mail Marketing, Freedom Marketing, and www.mailingprogram.com, made and continue to make unfair and deceptive claims to the public nationally via their Internet web sites and in classified sections of magazines. The public is vulnerable to guarantees of working at home opportunities providing the opportunity of making thousands of dollars weekly. The public is also vulnerable to false guarantees of refunds if the product ordered does not arrive or if the customer is not satisfied. Defendants lure consumers who need more income to send their money to the

Defendants, who, in turn, “take it and run.” Additionally, Defendants’ business Plan constitutes an unlawful chain referral system which perpetuates Defendants’ unfair and deceptive scheme. Consumers lose money, even if they receive the “business package.” The “business package”, which is supposed to tell, in detail, how the consumers will make the guaranteed thousands with no more money outlay on their part, reveals, for the first time, the actual, unlawful “Plan.”

Consumers who need to work at home for whatever reason - age, disability, young children - are not making the thousands of dollars stuffing envelopes that they were guaranteed by Defendants. Instead, they are losing the little money they may have to Defendants’ active deceptive scheme - a scheme that is deceptive from beginning to end. Defendants are currently violating and have violated our State’s consumer protection laws and other applicable law. Furthermore, with Defendant Payton Abernathy’s unlawful enterprises centered in Knoxville, Tennessee, the reputation of the State of Tennessee’s marketplace suffers. Defendant Abernathy and his operations must be stopped; this Court has that authority based on the evidence presented to the Court and applicable law.

The State of Tennessee must preserve the integrity of its marketplace. The public interest demands meaningful action by the State and this Court. Based upon the facts evidenced by the Complaint, Motion, supporting exhibits and upon applicable law, entry of a temporary injunction order, appointment of a receiver, an asset freeze and temporary revocation of any Tennessee business license through which Defendants conduct unfair and deceptive trade practices are appropriate actions to preserve the status quo and prevent additional harm to consumers and Tennessee’s marketplace.

These Defendants have not acted in good faith in the past; it is unlikely they will act in good faith pending a trial on the merits. Moreover, Defendants have shown themselves to be

systematic wrongdoers. Defendants's unfair and deceptive plot has definite steps involved in it - no matter which name Defendants use. It is no accident that Defendants use private mail drop boxes and have never disclosed any physical address to their consumer "customers"; it is no accident that Defendants have used multiple names. Defendants never disclose the real "Plan" until after Defendants have received money from responding consumers. The remedies sought will prevent any additional harm to consumers and, hopefully, restore to them money lost by virtue of Defendants' unlawful envelope stuffing scheme. Copies of unreported cases and cases from other jurisdictions are attached.

For these reasons, as set forth more fully below, the Court should grant the State's motion.

ARGUMENT

A. THIS COURT HAS EXPRESS STATUTORY AUTHORITY TO ISSUE TEMPORARY INJUNCTIONS AND PERMANENT INJUNCTIONS AGAINST VIOLATIONS OF THE TENNESSEE CONSUMER PROTECTION ACT AND OTHER STATE LAWS.

Express statutory provisions authorize the State to seek a temporary injunction. Tenn.

Code Ann. § 47-18-108(a)(1) provides:

Whenever the consumer affairs division has reason to believe that any person has engaged in, is engaging in, or based upon information received from another law enforcement agency is about to engage in any act or practice declared unlawful by this part and that proceedings would be in the public interest, the attorney general and reporter, at the request of the consumer affairs division, may bring an action in the name of the state against such person to restrain by temporary restraining order, *temporary injunction* or permanent injunction the use of such act or practice.

(Emphasis added). Tenn. Code Ann. § 47-18-108(a)(4) specifically authorizes the court to issue

a temporary injunction:

The courts are authorized to issue orders and injunctions to restrain and prevent violations of this part, and such orders and injunctions shall be issued without bond.

The authorization to the Tennessee Division of Consumer Affairs Division in Tenn. Code Ann. § 47-18-108(a)(1) to seek injunctive and other equitable relief constitutes the legislative determination that there is an irreparable injury in any violation of the Tennessee Consumer Protection Act and that the balance of harm preponderates in favor of the State. 11 A Charles Alan Wright, Arthur R. Miller and Mary K. Kane, *Federal Practice and Procedure* § 2948.4, 208-211 (2d ed. 1995); *Accord Hunt v. U.S. Securities & Exchange Comm'n*, 520 F. Supp. 580, 608-09 (N.D. Tex. 1981); *DeMayo v. State of Indiana*, 394 N.E. 2d 258, 261 (Ind. Ct. App. 1979).

In cases of continuous violations of remedial statutes, such as the instant case, statutory injunctions may issue by a court, which is required to act primarily in the public interest. C. Wright & A. Miller, M. Kane, *supra* at 209. In regulatory enactments such as the Consumer Protection Act, there is a presumption that the public interest has been considered by the Legislature. *Id.* When this determination has been made by statute, no further showing of irreparable injury or imbalance of hardships is necessary. *Id.* While no further showing is necessary, the State's Complaint and supporting exhibits to the Complaint and to the Motion do evidence irreparable injury and an imbalance of hardships. The legislative authorization in Tenn. Code Ann. § 47-18-108(a)(1) and (a)(4) complement this Court's authority to issue a temporary injunction under Tenn. R. Civ. P. 65.

A statutory injunction may issue upon showing a *prima facie* case of illegality. In *Commodity Futures Trading Comm'n v. Mueller*, 570 F.2d 1296, 1300 (5th Cir. 1978), the Court stated as follows:

In actions for statutory injunction, the agency need not prove irreparable injury or the inadequacy of other remedies as required in private injunctive suits. A *prima facie* case of illegality is sufficient.

Tennessee's own courts of record have recognized that the proper standard for a statutory temporary injunction is what the Legislature has stated in plain language. See *State v. Froehlig, et al.*, No. 33293, Cir. Ct. of Tenn., 21st Jud. Dist., Williamson County, Div. II (Mar. 2, 2007); *State v. Olomoshua, et al.*, No. 06C2912, Cir. Ct. of Tenn., 20th Jud. Dist., Davidson County, Div. III (Nov. 16, 2006); *Tennessee Real Estate Comm'n v. Hamilton*, No. 01A01-9707-CH-00320, 1998 WL 272788, at *4-6 (Tenn. Ct. App. May 22, 1998); *State v. Continental Distributing Co.*, No. 74892, Ch. Ct. of Tenn., 11th Jud. Dist., Hamilton County, Part I (Sept. 1, 1994); see also *FTC v. Nat'l Testing Servs., LLC*, No. 3:05-0613, 2005 WL 2000634 (M.D. Tenn. Aug. 18, 2005). Pursuant to *Froehlig, Olomoshua, Tennessee Real Estate Commission, Continental Distributing Co., and National Testing Services*, the movant's burden for a statutory temporary injunction is met upon a demonstration of a substantial likelihood of success of demonstrating at trial that the non-movants are violating the statute. A showing of immediate and irreparable harm is assumed with the violation of the statute. Proof of immediate and irreparable harm or the inadequacy of other remedies is not required for a statutory temporary injunction.

Other state courts that have addressed the "statutory injunction" issue have agreed with

Tennessee's courts, concluding that when such statutory authority exists, one need not make a separate showing of irreparable harm or inadequacy of other remedies. The Ohio Supreme Court established that when a statute grants a specific injunctive remedy to an individual or to the state, the party requesting the injunction "need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law." *Mid-America Tire, Inc., v. PTZ Trading*, 95 Ohio St.3d 367, 378, 768 N.E.2d 619, (Ohio 2002)(quoting *Stephan v. Daniels*, 27 Ohio St. 527, 536 (Ohio 1875)). In *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo. Ct. App. 1973), the defendants objected to the issuance of an injunction against them under the state's consumer protection statute, on the ground that there was no showing by the State of Missouri of lack of adequate legal remedy or that irreparable injury was threatened. In rejecting the defendant's objection, the Missouri Court of Appeals reasoned that the Missouri legislature, by enacting a statutory scheme creating a public right to protect consumers, created a new remedy - authorization of the issuance of an injunction when a violation is found. That legislative authorization constitutes sufficient authorization without more for the propriety of an injunction in a case under the statute. *Id.* at 370.

Similarly, in *Reed v. Allison and Perrone*, 376 So. 2d 1067 (La. Ct. App. 1979), the appeals court held that the State of Louisiana need not show irreparable harm to obtain injunctive relief under its consumer protection statute. At issue in that case was the Louisiana Unfair Trade Practices and Consumer Protection Law, which granted the Attorney General the right to seek injunctive relief upon a showing that a person was using, had used, or was about to use any method, act or practice declared unlawful by the statute. Construing that statute, the court noted

that it “frees the attorney general from the burden of proving irreparable injury or that he has no adequate remedy at law.” *Id.* at 1069. In the instant case, the record establishes that violations of the Tennessee Consumer Protection Act have occurred, are occurring and will continue to occur. Freedom Marketing, Defendants’ most recent name for their unlawful business, continues to take consumers’ money and will continue to perpetrate this scheme without Court jurisdiction.

Federal courts agree with the state court interpretations and applications of statutory authorizations of temporary injunctions. *See Commodity Futures Trading Comm’n v. British American Commodity Options Corp.*, 560 F. 2d 135, 141 (2d Cir. 1977); *Henderson v. Burd*, 133 F.2d 515, 517 (2d Cir. 1943); *Commodity Futures Trading Comm’n v. Carnegie Trading Group, LTD., et al.*, 450 F. Supp.2d 788 (N.D. Ohio 2006); *Commodity Futures Trading Comm’n v. J. S. Love & Associates Options Limited*, 422 F. Supp. 652, 661 (S.D.N.Y. 1976). The reasoning applied in these federal cases and other state cases cited is applicable in the present case. The Tennessee Consumer Protection Act explicitly gives the State the right to obtain an injunction to remedy violations of the Act, which have occurred, are occurring or are about to be engaged in by a person. Tenn. Code Ann. § 47-18-108 (a)(1) and (a)(4).

A temporary injunction is appropriate in this case given Defendants’ continuing, blatant failure to adhere to the State’s consumer protection laws.

B. THIS CASE CONSTITUTES A PROPER CASE FOR APPOINTMENT OF A RECEIVER FOR ALL DEFENDANTS, ASSET FREEZE, AND REVOCATION OF LICENSE TO DO BUSINESS IN TENNESSEE.

In addition to the injunctive relief authorized under Tenn. Code Ann. § 47-18-108(a), the Act authorizes courts to make orders that will restore money or property to those injured by

unlawful acts or practices. Tenn. Code Ann. § 47-18-108(b)(1) provides that in civil actions in the name of the State:

The Court may make such orders or render judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use of employment of such unlawful method, act or practice, of any money or property, real, personal or mixed, or any other article, commodity or thing of value wherever situated, which may have been acquired by means of any act or practice declared to be unlawful by this chapter.

The Court's order of relief must be predicated on three requirements. First, there must have been an "ascertainable loss of money or property." Second, there must be a reasonable probability that the loss was caused by an act or practice prohibited by the Act. Third, the remedial order must be "necessary" to accomplish "restitution" of the money or property - that is, restitution to the consumers.

The Complaint, Motion and exhibits, establish the first requirement. The consumer purchasers have been injured by the Defendants' practices and have been deprived of their money by the Defendants. Their losses are "ascertainable losses"¹ - their registration fees plus any other out of pocket expenses, *e.g.*, money paid for Defendants' "rush delivery" of their "business package."

Section 47-18-108(b)(1) also requires that the consumers' losses be caused by "use or employment of such unlawful method, act, or practice" or losses "which may have been acquired by means of any act or practice declared to be unlawful by this chapter." The phrase "may have been acquired" indicates that the Court may order the requested relief when the State's probability of success on the merits, as here, is strong. This is a familiar consideration of a court

¹ Tenn. Code Ann. § 47-18-2102(1)***

of equity in appointing receivers and in ordering extraordinary relief generally. *See* William H. Inman, *Gibson's Suits in Chancery* § 358 (6th ed. 1982) (hereinafter *Gibson's Suits in Chancery*).

A receivership and asset freeze are necessary to restore ascertainable losses to consumers. The State has adduced facts, by affidavits and other documents, which demonstrate that a receiver should be appointed for the purposes of preserving Defendants' records, books, assets and other matter. The State seeks to ensure that these records will not be lost, destroyed or otherwise rendered unavailable and that meaningful restitution to consumers in this case is not rendered impossible. *See* Tenn. Code Ann. §§ 29-1-103, 47-18-108 (b)(1). Accordingly, to obtain substantial justice under the facts presented in the Complaint, Motion and accompanying exhibits, a receiver should be appointed to control Defendants' bank accounts, mail and any other records in order to preserve the status quo and protect any assets.

The remedy of receivership is uniquely suited to this action and is logically included among the "order or . . . judgments" that a Court is authorized to issued under the Act. Tenn. Code Ann. § 47-18-108(b)(1). Because the Legislature has expressly and emphatically given Tennessee courts the power to make orders restraining dissipation of assets and to secure ultimate restitution to consumers, it would be contrary to the legislative purpose and policies behind the Tennessee Consumer Protection Act, if this Court could not grant the extraordinary relief the State requests.

If the Court eventually renders a final judgment of restitution in this case, such a judgment will be meaningless unless a receiver is appointed to preserve mail, records and assets, including but not limited to monetary assets. Defendants have consistently demonstrated their failure to conduct their business in a manner that is free of unfair or deceptive acts and practices

which harm the public. “No one can take advantage of his own wrong.” William H. Inman, *Gibson’s Suits in Chancery* § 27 at 525 (7th ed. 1988). The State prays that this Court will appoint a receiver and freeze the Defendants’ assets so that these Defendants cannot take advantage of their own wrong. Otherwise, innocent consumers will suffer to the benefit and advantage of Defendants, who have violated and continue to violate the Act. *See Id.*

C. THE LEGISLATURE AUTHORIZES THIS COURT TO APPOINT RECEIVERS UNDER OTHER STATUTES, AS WELL.

Tenn. Code Ann. § 29-1-103 provides:

The courts are all vested with power to appoint receivers for the safekeeping, collection, management, and disposition of property in litigation in such court, whenever necessary to the ends of substantial justice, in like manner as receivers are appointed by courts of chancery.

Traditionally, appointment of a receiver has been approved when necessary “for the purpose of preserving the property in controversy, pending the litigation, for the benefit of the successful party.” *In re Armstrong Glass Company, Inc.*, 502 F.2d 159, 163 (6th Cir. 1974) (quoting from *Johnston v. Hanner*, 70 Tenn. 8, 11 (1878)); *Roberson v. Roberson*, 71 Tenn. 50, 52 (1879). *Accord Gibson’s Suits in Chancery* § 351.

The appointment of a receiver is a matter within the sound discretion of the Chancellor. *Young v. Cooper*, 30 Tenn. App. 55, 203 S.W. 2d 376, 387 (1947). In exercising this discretion, certain considerations favor the appointment of a receiver, including:

That the defendant has been guilty of fraudulent or other inequitable conduct, jeopardizing plaintiff’s rights.

That the parties interest are numerous, and not one of them has any particular right to the possession of the property.

That a receivership can do no one any particular harm, and may be of great benefit to those entitled to the property, or its proceeds.

William H. Inman, *Gibson's Suits in Chancery* § 27 at 525 (7th ed. 1988). All of these considerations favor appointment of a receiver, in this case, for the purpose of preserving assets of Defendants, of exercising dominion over Defendants' drop boxes, bank accounts, and any assets, wherever situated, pending resolution of this case.

D. THE EVIDENCE SUPPORTS THE COURT'S ISSUANCE OF A TEMPORARY INJUNCTION PENDING A HEARING ON THE MERITS.

The Tennessee Consumer Protection Act expressly provides for statutory temporary injunction orders. Tenn Code Ann. 47-18-108(a)(1) and (a)(4). The evidence adduced and the law cited herein support the issuance of a temporary injunction, appointment of a receiver, an asset freeze, temporary revocation of Defendant Abernathy's Freedom Marketing business license and any other licenses through which Defendants conduct their unlawful scheme, and, ultimately, a permanent injunction, restitution, civil penalties, disgorgement of benefits derived from Defendants' unlawful scheme and permanent revocation of Defendants' business licenses. *See* Tenn. Code Ann. § 47-18-108 (b)(2) (if evidence has been presented to the court establishing knowing and persistent violations, the court may temporarily or permanently revoke license to do business in this state). The evidence demonstrates Defendants' ongoing consumer fraud and numerous violations of the Tennessee Consumer Protection Act. Defendants' unlawful scheme, promoted locally and nationally, conducted from Knox County, Tennessee, must be stopped.

Assuming arguendo, that no express provision for a statutory temporary injunction existed to relieve the Attorney General & Reporter from having to establish irreparable harm and lack of any legal remedy, a temporary injunction under Tenn. R. Civ. P. 65 would be appropriate under these circumstances. When considering requests for temporary injunctions made by

private parties, pursuant to Tenn. R. Civ. P. 65, the courts usually consider four factors: (1) substantial probability of success on the merits; (2) a significant threat of irreparable injury or loss in the absence of relief; (3) the relative absence of harm caused to the Defendant by the proposed injunction; and (4) the service of the public interest. *Lillard v. Burson*, 933 F. Supp. 698 (W.D. Tenn. 1975). These “ ‘four considerations are factors to be balanced, not prerequisites that must be met.’ ” *Memphis Planned Parenthood, Inc. v. Sundquist*, 184 F.3d 600 (6th Cir. 1999) (citing *Mascio v. Public Employees Retirement Sys.*, 160 F.3d 310, 312-13 (6th Cir. 1998)) (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)). The Complaint, Motion and supporting exhibits establish the presence of all four factors. One factor is not determinative; the factors must be weighed equitably. *Advisory Info. and Mgt. Sys., Inc. v. Prime Computer, Inc.*, 598 F. Supp. 76 (M.D.Tenn. 1984).

The Attorney General & Reporter is charged, by statute, to enforce the Tennessee Consumer Protection Act. The Attorney General & Reporter has established through exhibits to the Motion and the Complaint, that Defendants have engaged in, are engaging in, and are about to engage in violations of the Act. Defendants’ violations harm the public. The public interest will be served if the State’s motions are granted.

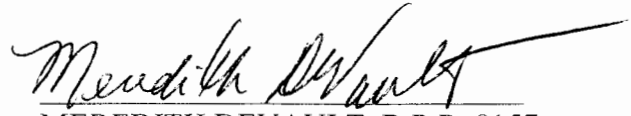
CONCLUSION

For the foregoing reasons, the Attorney General & Reporter, respectfully requests that the Court enter a temporary injunction order, appoint a receiver to preserve the status quo, freeze all assets of Defendants and revoke Defendant Abernathy’s business license in the name of Freedom Marketing and any other business licenses operating Defendants’ money stuffing envelope scheme, pending further order of the Court.

Respectfully submitted,

STATE OF TENNESSEE

ROBERT E. COOPER, JR., B.P.R. 10934
Attorney General & Reporter

A handwritten signature in black ink, reading "Meredith DeVault", with a long horizontal flourish extending to the right.

MEREDITH DEVAULT, B.P.R. 9157
Senior Counsel
Tennessee Attorney General's Office
Consumer Advocate & Protection Division
425 Fifth Avenue North
Nashville, TN 37243
(615) 532-2578
Facsimile (615) 532-2910
Email: Meredith.DeVault@state.tn.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document is to be served, pursuant to the Tenn.R.Civ.P., by the Knox County Sheriff's Office upon Payton Abernathy, 855 Paxton Drive, Knoxville, TN 37918; Peyton Enterprises, Global Mail Marketing, Make Money Stuffing, PC Enterprises, American Mail Marketing, Freedom Marketing, www.mailingprogram.com, also at the address of 855 Paxton Drive, Knoxville, TN 37918

and

Kevin Sparks
9816 Colby Station Lane
Knoxville, TN 37922-4249

on this the 3rd day of April, 2007.


MEREDITH DEVAULT
Senior Counsel